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WHY QUINE IS NOT A POSTMODERNIST

*Brian Leiter**

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I. INTRODUCTION

DENNIS Patterson's wide-ranging book *Law and Truth*[1] has the great virtue of locating questions of legal theory within their broader (and rightful) philosophical context—that is, as special instances of more general problems in metaphysics and the philosophy of language. The book also sets out a position in jurisprudence that has some undeniable attractions.[2] Although I have a number of disagreements with Patterson's treatment of the substantive philosophical issues at stake, there can be no doubt that he has performed a useful service in forcing legal philosophers to think seriously about the distinctively *philosophical* problems that define the discipline of jurisprudence.

I organize my discussion around one topic in particular—namely, Patterson's identification of the great American philosopher Willard van Orman Quine (born 1908) as a pivotal figure in the transition from "modernity" to "postmodernity."[3] This characterization, I will argue, involves an important misunderstanding of Quine's thought. Both the "postmodernism" of its most famous advocates (e.g., Derrida, Lyotard) and Patterson's "sanitized" postmodernism possess only a superficial affinity with Quine's philosophy. This should not be surprising to those who correctly recognize Quine as a key figure in the "naturalistic" turn in

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I am very pleased to contribute this paper to the symposium on *Law and Truth*, as but a small token of my gratitude to Dennis Patterson for his unflagging encouragement and support over the last five years.

1. DENNIS PATTERSON, LAW AND TRUTH (1996).
2. On this point, see Ben Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679 (1997).
3. *See* PATTERSON, *supra* note 1, at 158-59.

philosophy over the last thirty years.[4] Philosophers who have taken the naturalistic turn reject the idea of philosophy as a purely *a priori* discipline, whose methods and results are antecedent to—indeed stand above and adjudicate among—the claims of science; philosophy for the naturalist is rather a discipline whose methods and answers must be continuous with, or perhaps supplanted by, scientific inquiry. Like the logical positivists, Quine remains committed to the primacy of science (especially physical science) in constructing our best theory of the world. He does so for different reasons than the positivists, but in the end it is crucial to recognize (as one commentator has aptly put it) that Quine "remained faithful to the underlying spirit of positivism."[5] This central aspect of Quine's thought is lost in Patterson's assimilation of Quine into "postmodernism," with its emphasis on the idea that "no practice or discourse enjoys a privileged position vis-á-vis others."[6] Quine, as we shall see, plainly repudiates such a posture of "tolerance." I, of course, have a particular interest in correcting this misunderstanding because of the central role Quine plays in my arguments for "naturalized jurisprudence," a jurisprudence with few affinities to the "postmodern" jurisprudence Patterson defends.[7]

I proceed as follows. In Part II, I briefly outline my understanding of Patterson's core jurisprudential position, as defended in Chapters 7 and 8 of *Law and Truth*. This sets the stage for my understanding of Patterson's particular interpretation of Quine, which is the subject matter of Part III. I demonstrate the inadequacies of this understanding of Quine, and offer an alternative interpretation of the structure of Quine's thought.

II. LEGITIMACY IN ADJUDICATION, TRUTH IN LAW

Patterson draws on the work of the well-known constitutional theorist, Philip Bobbitt, in introducing his conception of "truth" in law.[8] Bobbitt's work is widely recognized for its rich and subtle portrait of the different "modalities" of constitutional argument. This portrait resonates immedi-

4. He is not, I hasten to add, the only figure. Indeed, the Quinean program for "naturalizing" philosophy seems too radical to most philosophers. Far more influential is the paradigm for "naturalizing" philosophy developed in Alvin Goldman's work since the late 1960s, culminating in ALVIN I. GOLDMAN, EPISTEMOLOGY AND COGNITION (1986). For an overview of some of the major issues (with attention to Goldman's influence), see Philip Kitcher, *The Naturalists Return*, 101 PHIL. REV. 53 (1992).

5. CHRISTOPHER HOOKWAY, QUINE 2 (1988).

6. PATTERSON, *supra* note 1, at 182.

7. *See* Brian Leiter, *Legal Realism, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., 1996); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. (forthcoming Dec. 1997).

8. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991). I shall not be concerned with the adequacy of Bobbitt's view itself, but only with the adequacy of the view Patterson finds in Bobbitt. For a penetrating critique of Bobbitt's position (one with ramifications for Patterson's view as well), see J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994). For Bobbitt's response, see *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869 (1994).

ately with anyone who has spent time studying the twists and turns of constitutional argument in the courts, the law journals, or lawyers' briefs. But Bobbitt's ambition is to do more than provide the definitive descriptive sociology of how constitutional lawyers argue. According to Patterson, Bobbitt's work also shows that the debate about the legitimacy of judicial review "is a pseudodebate, driven largely by a false picture of the nature of argument in constitutional law."[9] While conventional theorists have thought that constitutional argument must be "legitimated,"[10] Bobbitt shows that, "[t]o be legitimate, a constitutional argument must not veer from use of the modalities."[11]

This whole line of thought seems to trade on an ambiguity in the meaning of the word "legitimate." Legitimacy in the *philosophical* sense asks whether a particular practice is *justified*. Legitimacy in the *sociological* sense asks whether a particular practice is "accepted" or "viewed as legitimate" by participants in the practice. The question about the legitimacy of judicial review is a question of how the exercise of coercive political power by courts can be *justified* in a democratic society.[12] From an answer to this familiar question of political philosophy, we may derive morals about which forms of constitutional interpretation are proper in a society such as ours, that is, are consistent with the exercise of coercive power by courts.

By contrast, the sense of legitimacy at stake in claims like "to be legitimate, a constitutional argument must not veer from use of the modalities"[13] seems to be purely sociological—in effect, Patterson is saying that Bobbitt's descriptive sociology of the modalities of argument actually used by constitutional lawyers is such a good descriptive sociology that a constitutional argument that fits one of those modalities will be recognized and accepted immediately by good constitutional lawyers.[14] But a practice of argument can be quite legitimate in the sociological sense—i.e., parties to the practice can all feel, "Yes, this is a proper way to argue"—and still be utterly illegitimate in the philosophical sense, because the exercise of political power on the basis of such arguments cannot be adequately justified or defended in a democratic society. Bobbitt's theory of the sociological legitimacy of constitutional arguments is probably right, but this has no bearing on the question of whether judicial review is

9. PATTERSON, *supra* note 1, at 129.
10. *See id.* at 129-30.
11. *Id.* at 129.
12. I am puzzled by Patterson's assertions that the conventional debate about judicial review is "driven by a mistaken picture of the nature of truth in constitutional law," *id.*, or that it "treats propositions of constitutional law as if they were propositions about the world (empirical propositions)," *id.* at 133. I do not see that the traditional debate about judicial review presupposes either of these claims.
13. *Id.* at 129.
14. Compare this passage from Bobbitt, which Patterson quotes: "[J]udicial review that is wicked, but follows the forms of argument, is legitimately done; and review that is benign in its design and ameliorative in its result but which proceeds arbitrarily or according to forms unrecognized within our legal culture, is illegitimate." *Id.* at 146 (quoting BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 8, at 28).

legitimate in the philosophical sense, i.e., justified. What we would need is an *argument* to the effect that philosophical questions of justification just collapse into sociological questions about what participants in a practice are willing to "accept as legitimate." I do not see such an argument in Patterson, and without such an argument, Bobbitt's point is (contrary to Patterson) simply a non-sequitur on the question about the legitimacy of judicial review.

Yet the more important idea Patterson wants to extract from Bobbitt's work is that "truth in law is a matter of the forms [or modalities] of legal argument . . . ,"[15] i.e., a proposition of law is true if it is supported by one or more of the modalities of legal argument. Truth in law, then, is "internal" (in some sense that remains vague) to the practice of legal argument.

Patterson's point here, as I understand it, relies on an attractive intuition, one widely shared, I suspect, by lawyers. The intuition might be put this way: When Dworkin gives a belabored argument of moral philosophy for the constitutionality of affirmative action,[16] or Posner gives a complex efficiency argument for the law of negligence,[17] whatever it is that they are doing does not look much like law. Their arguments, whatever their intellectual merit and ingenuity, do not sound much like *lawyer's* arguments, the sorts of arguments lawyers could stand up and make in court without being laughed out of the courtroom or cited for contempt.

This point can be more broadly characterized. There has been an unsurprising tendency among the professional class of legal academics to want to develop "theories" of the law: tort law is *really* about efficiency or about corrective justice; constitutional law is *really* about enforcing the individual's rights as a matter of moral argument; and the like. These "theories" may form the substance of academic debates and tenure decisions, but they do not have much to do with legal argument, what lawyers and judges really do. In their quest to "reduce" legal categories and legal arguments to economic or philosophical ones, legal academics miss the distinctive "internal" logic and integrity of the actual practice of legal argument as we find it in countless oral arguments and written briefs submitted every day throughout the country.

This is, I hope, a sympathetic restatement of the intuition that animates Patterson's position (and perhaps also Bobbitt's position). As attractive as this intuition may initially appear, it also seems to me inadequate as an objection to the theories of scholars like Dworkin and Posner. The objection strikes me as false insofar as it denies that someone like Dworkin *describes* the practice of legal argument, since that is precisely what Dworkin does—though at a deeper level than the superficial level of how

15. *Id.* at 150.

16. *See, e.g.*, Ronald Dworkin, *Reverse Discrimination*, *in* TAKING RIGHTS SERIOUSLY 223 (1977).

17. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 163-202 (4th ed. 1992).

theoretically unreflective judges and lawyers argue.[18] As Dworkin says in *Law's Empire*: Though real judges are less methodical than Hercules, Dworkin's ideal judge, "Hercules [nonetheless] shows us the hidden structure of their judgments and so lays these open to study and criticism."[19]

But if the objection is, instead, that this putative description of legal argument at a "deeper" level does *not* really succeed in describing the practice of argument by lawyers and judges, then the objection is question-begging, for that is precisely what Dworkin argues it does. What we would need, and what I do not find in Patterson, is an argument against Dworkin's descriptive claim that his theory of adjudication describes "the hidden structure" of legal arguments. To assert that Dworkin (or Posner or anyone else) makes propositions of law "true" by reference to something "outside" of the law does not constitute an argument but rather the conclusion of an argument that still needs to be made.

How does the foregoing connect with "postmodernism?" Patterson's view is that theories like Dworkin's and Posner's are still in the grips of a "modernist" conception of language as essentially *representational*, as "picturing" facts about the world. On this view, a particular proposition like, "Leiter is liable for his intentional infliction of emotional distress," is true just in case the "facts" are as the sentence pictures them. Sentences are "true," we might say, insofar as they correspond to facts about the world.

The "postmodern" alternative—which is attributed, variously, to Wittgenstein, Quine, Rorty, and Putnam—involves "a shift from a concept of language as representation to language as practice (meaning as use). It is a move from [language as] picturing to [language as] competence, with competence being a manifested ability with and facility in a language."[20] But how do we know that a particular use of language—e.g., saying "it is true that Patterson is liable for his negligence"—is a competent use of language? Patterson, quoting Putnam, states that the measure of such competence is whether "a sufficiently well-placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation."[21] This answer, however, seems to be in tension with another one of Patterson's central themes, namely that "the realism/antirealism debate is phony."[22]

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18. As two commentators have aptly observed: "Dworkin's account of legal principles is, of course, abstract and theoretical. But its force as an account comes from how well it tracks the standard methodologies of legal scholars, advocates, and judges . . . ." Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279, 288 (Andrei Marmor ed., 1995). This "reconstructive" methodology that Dworkin describes "is the dominant methodology in both the practice of law and in legal scholarship." *Id.*

19. RONALD DWORKIN, LAW'S EMPIRE 265 (1986). Posner shares this view, as he makes explicit in RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 372-73 (1990).

20. PATTERSON, *supra* note 1, at 169.

21. *Id.* at 168.

22. *Id.* at 166.

Let me say a few quick words about the debate to which Patterson alludes. The "realist" holds that the meaning of a sentence is given by its "truth-conditions" (i.e., the facts that would have to be obtained in the world for the sentence to be true), and that these truth-conditions can, in principle, transcend our best capacities to verify them. The anti-realist denies that "truth" (or "truth-conditions") can transcend our epistemic capacities; "truth" for the anti-realist is "epistemically" constrained. In that sense, "truth" for the anti-realist is often said to be a matter of "warranted assertibility:" What is "true" is what we (given our epistemic capacities) would be warranted in asserting.

Stated more informally, the realist holds that the "truth" is whatever it is, regardless of whether we human beings now know it or could ever come to know it; the anti-realist holds that "truth" can not outrun our capacity for verifying or knowing it. The anti-realist view suggests a type of "relativism or crass conventionalism,"[23] in the sense that "truth" is relative to our epistemic capacities or to our existing (or potential) conventions for establishing what the "truth" is.

Now we can articulate the tension between Patterson's claim to have transcended the realism/anti-realism debate and his invocation of Putnam's view that a "competent" use of language is one in which "a sufficiently well-placed speaker who used the words in that way would be fully warranted in counting the statement as true of that situation."[24] The problem is that Putnam's account of "competence" ties correct and incorrect usage to what we "would be fully warranted in counting . . . as true," i.e., it makes "competence" relative to epistemic capacities, and thus sounds like a classic anti-realist position![25] So "postmodernism" on Patterson's account turns out to be indistinguishable from anti-realism—a result that would not be surprising to some.[26]

Patterson, however, follows Rorty[27] in arguing that by rejecting "representationalism"—the view that language and truth are matters of accurate representation rather than of social practice and approval—the realism/relativism debate has been rendered unintelligible.[28] The idea, roughly, is this: Once we dispense with the idea of language as representing the way things are, then we no longer have to worry about whether our ways of talking about the world correspond to the (realist) truth (i.e., the way things really are, regardless of what we think), or whether they merely reflect some "relative" truth (i.e., the way we happen to be warranted in taking them to be). So, by rejecting the view that language is

23. *Id.* at 169.

24. *Id.* at 168.

25. Compare the worries expressed about the potential relativism in Putnam's view in Brian Leiter, *The Middle Way*, 1 LEGAL THEORY 21, 26 n.32 (1995).

26. *See, e.g.*, Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

27. *See* PATTERSON, *supra* note 1, at 166-68.

28. *See, e.g.*, Richard Rorty, *Introduction: Antirepresentationalism, Ethnocentrism and Liberalism*, *in* OBJECTIVITY, RELATIVISM, AND TRUTH (1991).

representational, we are supposed to eliminate any worries about the objectivity or relativity of truth.

This argument, however, seems to miss the force of the charge of relativism. For if the core of relativism is that conflicting views can be equally "valid" (where valid means "true" *or* "warranted" *or* "competent"), then precisely by rejecting representationalism (and a substantive notion of "truth") *and* by relativizing warrants to existing social or linguistic practice, Patterson (and Rorty) embrace relativism in precisely the same sense that anyone has ever cared about. Conflicting views can be "equally valid" as long as they are sanctioned by conflicting linguistic or argumentative practices.

So Patterson's "postmodernism" devolves into a type of familiar relativism or anti-realism—a view that is certainly Putnam's view, circa the early 1980s, and is probably also Rorty's view. I very much doubt that it is the position of Wittgenstein,[29] but my main concern is to make clear why this view could not be Quine's.

Before doing so, however, I want to say something about the connection of Patterson's "postmodernism" to better-known versions in the work of various "French" theorists. In Lyotard's influential work,[30] for example, postmodernism is associated with the demise of "metanarratives," with the notion that we could ever formulate a comprehensive theory of the world, social and natural, that would give us a "truer" picture of reality. The "postmodern" stance is marked by a spirit of epistemic tolerance: there are many viable ways of understanding the world, many different, equally valid "perspectives," none of which can claim an epistemic privilege over all the others. This "tolerant" spirit is surely familiar from the work of Derrida, Lyotard, Rorty, Fish, Putnam, Feyerabend, and Goodman, among others.[31] How is it implicated in Patterson's version of postmodernism?

Patterson's account avoids, happily, the sophomoric obscuratism of Derridean ramblings in favor of locating the ground of the "postmodern" perspective in substantive philosophical theses. The core notion is, once again, the idea that language is *not* essentially representational, but is rather a certain sort of "social practice," in which the standards of correct and incorrect usage are the product of the practice itself (rather than "the way the world really is" or the like). But once we give up the idea of language as "representational" (so the argument goes), then we also give

29. This type of interpretation of Wittgenstein was developed in CRISPIN WRIGHT, WITTGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS (1980), and was, in turn, aptly criticized in John McDowell, *Wittgenstein on Following a Rule*, 58 SYNTHESE 325 (1984). Wright himself later rejected his earlier "anti-realist" interpretation of Wittgenstein. *See* Crispin Wright, *Wittgenstein's Rule-Following Considerations and the Central Project of Theoretical Linguistics*, *in* REFLECTIONS ON CHOMSKY 233 (Alexander George ed. 1989).

30. JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., 1984).

31. It is also often attributed, wrongly, to Nietzsche. *See* Brian Leiter, *Perspectivism in Nietzsche's* Genealogy of Morals, *in* NIETZSCHE, GENEALOGY, MORALITY 334, 334-35 (Richard Schacht ed. 1994). Much of the discussion there bears on the issues at stake here.

up the possibility of defending any one region of discourse—say, science—as better "representing" reality than all the others. The anti-representationalist position in semantics—the view that language is not a medium for representing the world, but rather a "practice" by which we cope with the world[32]—underwrites the postmodern spirit of epistemic tolerance by showing that all "meaning arises from human practices and that no practice or discourse enjoys a privileged position vis-à-vis others,"[33] since the notion of "privilege" would only have been intelligible if the "representational" view of language had proven correct.

III. PATTERSON'S QUINE VERSUS QUINE THE NATURALIST

It is impossible to understand Quine's contributions to philosophy without an appreciation of the philosophical background of logical positivism, to which Quine is reacting. Although Patterson correctly alludes to this point in passing,[34] his failure to pay it sufficient attention in the subsequent discussion has deleterious consequences. The basic story has been richly described elsewhere;[35] let me just recap the main points here.

For the positivists, truths were of two kinds: truths of meaning and empirical truths. The latter were the domain of scientific inquiry, while the former constituted the special domain of philosophy. Philosophy's task was to analyze the meanings of the central concepts necessary for empirical inquiry in science, as part of the more general positivist project of giving a "rational reconstruction" of science, that is, of vindicating the epistemically special status of science.

Quine's classic early papers—especially "Two Dogmas of Empiricism" (which Patterson discusses), "Carnap and Logical Truth," and "Truth by Convention" (which Patterson does not mention)—attack the idea that there is a real distinction between statements that are "true in virtue of meaning" versus those that are "true in virtue of empirical fact." In effect, he argues that all statements are answerable to experience, that none are "true in virtue of meaning" alone. Those we tend to call "analytic" are simply those that we are least willing to give up at that particular point in the history of inquiry. Whatever the empirical facts are, we are going to adjust other parts of our theory of the world to accommodate those facts, before we think about rejecting the "analytic" statements.[36]

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32. How exactly it does this without "representing" the world is a matter on which Patterson and other anti-representationalists are not ideally clear.

33. PATTERSON, *supra* note 1, at 182.

34. *See id.* at 158.

35. *See* GEORGE D. ROMANOS, QUINE AND ANALYTIC PHILOSOPHY (1983).

36. In 1962, Hilary Putnam argued, persuasively that, contrary to Quine, there really are some trivial analytic statements (e.g. that a "bachelor" is "an unmarried man" is "true in virtue of meaning"); but this concession costs Quine nothing in terms of the more substantial philosophical point against positivism, namely that in science there are no statements which are genuinely analytic, so that the proposed positivist reconstruction of scientific practice cannot get off the ground. The history of science, Putnam points out, is full of examples of purportedly "analytic" statements that are, at a later date, treated as revisable empirical statements. *See* Hilary Putnam, *The Analytic and the Synthetic*, *in* MIN-

The collapse of the analytic/synthetic distinction—the distinction between "true in virtue of meaning" versus "true in virtue of fact"—has ramifications for philosophy. For on the positivist picture, the "analytic" side of the divide was the business of philosophy, while the "synthetic" side was the business of empirical science. But if Quine is right, then there is just nothing there on the "philosophy" side of the divide; there are no "truths in virtue of meaning" for philosophers to analyze and explicate. The only truths are empirical truths, and thus all questions are scientific questions. Philosophy, then, gets "naturalized," i.e., it gets subsumed into science. This is the conclusion Quine explicitly draws in his later work, beginning especially with the classic 1968 paper "Epistemology Naturalized."[37]

There is, of course, another related line of argument running through Quine's work (most clearly in "Epistemology Naturalized"), which is directed at the specifically epistemological problems that animated logical positivism. The "foundationalist" program in epistemology, from Descartes to Carnap, aimed to provide scientific knowledge with an indubitable basis. Taking, once again, Carnap as the key philosophical figure, Quine argues against Carnap's foundationalist program in the *Aufbau* along two fronts: semantic and epistemic. Carnap's semantic program was to translate all sentences referring to physical objects into sentences referring only to sense-data; the semantic program cannot be carried out because of meaning holism, the Quinenan doctrine that theoretical terms get their meanings from their place in the whole theoretical framework, not in virtue of some point-by-point contact with sensory input. Carnap's explicitly epistemic program is to show that scientific theories are uniquely justified on the basis of sensory experience. The so-called "Duhem-Quine" thesis about the undetermination of theory by evidence dooms this project. There will always be more than one theory supported by the evidence, because for any piece of recalcitrant data, we always have two options: abandoning the theoretical hypothesis being tested, or preserving the hypothesis, but abandoning the auxiliary hypothesis that informed the test of the theoretical hypothesis.[38] With the failure of epis-

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NESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE (Herbert Feigl & Grover Maxwell eds., 1962), *reprinted in* HILARY PUTNAM, MIND, LANGUAGE AND REALITY 33, 56-69 (1975).

37. *See* W.V.O. Quine, *Epistemology Naturalized*, *in* W.V.O. QUINE, ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69 (1969).

38. Here is what I hope is a useful example of the point. Recall the Biblical story of King Solomon, in which Solomon must decide which of two women is the real mother of a particular child. Suppose Solomon hypothesizes that woman *A* is the *real* mother of the child, while woman *B* is not. Solomon tests the hypothesis by proposing that the women each get half of the child. If his hypothesis is correct, then he predicts that *A* will decline to "split" the child, and will let woman *B* keep the whole child. But notice that this prediction depends on an *auxiliary hypothesis* that the Biblical story never mentions—namely, that a *real* mother's concern for the well-being of her child is always stronger than her jealousy that another should have *her* child. Suppose, now, that, contrary to the prediction, *A* is eager to split the child, rather than let *B* just have the child. Logically, this is compatible with the hypothesis that *A* is the real mother, *if we reject the auxiliary hypothesis*. If we remain committed, however, to the auxiliary hypothesis, then experience falsifies the origi-

temological foundationalism, Quine thinks we must "repudiate the Cartesian dream of a foundation for scientific certainty firmer than scientific method itself."[39] Epistemology gets "naturalized" in the sense that its central question—the relation between sensory input and theoretical output—is to be answered by science (especially empirical psychology). Philosophy, for Quine, has nothing to contribute by way of *justifying* science, as the failure of the foundationalist program makes plain. This does not mean we can no longer talk about epistemic *norms*; it just means that these norms will themselves be the deliverances of science.[40]

One should not be misled here (as it appears Patterson may have been) by the apparent isomorphism between Quine's view that philosophy has nothing to contribute by way of *justifying* science and Patterson's view that, e.g., philosophy or economics has nothing to contribute by way of *justifying* law.[41] First, the justificatory problem at issue for Quine and for Patterson is different. Quine is concerned with the question of whether philosophy can give a rational defense of science as an epistemically superior mode of knowledge; a "justification" here amounts to showing that science has an epistemically privileged foundation compared to astrology, religion or metaphysics. In law, by contrast, the question of justification is simply whether the exercise of coercive power by courts is defensible in a democratic society (given certain normative principles that are central to a democratic society).

Notice, now, that the different content of the justifactory problem in each domain is mirrored in the *grounds* or *reasons* for then claiming that philosophy has no justificatory role to play. For Quine, philosophy cannot justify science because: (a) the foundationalist program in epistemology is doomed to failure (because of meaning holism and the Duhem-Quine underdetermination thesis); and (b) the collapse of the analytic-synthetic distinction, in any event, puts all questions—including justificatory questions—within the domain of science (there is no distinctive domain in which philosophy can do its work).

But where are the analogues of these arguments in Patterson's case against the possibility of justifying judicial review? As far as I can see, there are none proffered, nor are there any in the offering. In asking for a justification of judicial review in a democratic society we are not trying to solve any analogue of the foundational problem in epistemology; we are simply asking the familiar and intelligible question of whether, given the norms of a democratic society (which may not, themselves, have any "foundation"), it is permissible for courts to exercise coercive power, and if so, when. I do not see how meaning holism or the Quine-Duhem thesis make any difference in this context. Similarly, the collapse of the ana-

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nal hypothesis. But notice that *experience itself appears to do no work in determining which hypothesis we discard.* (I owe the idea for this charming example to Gila Sher.)

39. W.V.O. QUINE, PURSUIT OF TRUTH 19 (1990).

40. *See id.*

41. *See* PATTERSON, *supra* note 1, ch. 7.

lytic-synthetic distinction puts all questions into the domain of science *because science is already the domain in which synthetic questions—questions of fact—are answered.* I have no idea how this Quinean consideration would support Patterson's view that "justification" in law is "internal" to law. It seems to me that the more obvious point to make is that Quine's attack on the analytic-synthetic distinction—indeed Quine's whole philosophical posture which assigns primacy to science—is simply irrelevant to the question of whether judicial review is justified. I cannot imagine that this conclusion on my part will be surprising to lawyers or political philosophers.

One crucial upshot of Quine's naturalism is that "there is no Archimedean point of cosmic exile from which to leverage our theory of the world."[42] All theory is *scientific* theory for Quine; there is no theoretical standpoint from which we can ask, "But is our science true?" This looks superficially like Patterson's claim that "there is no Archimedean point of cosmic exile [or simply from outside law] from which to leverage the practice of judicial review." But the affinity, as I have just argued, is merely superficial. Quine's arguments for the claim that there is no standpoint outside science from which to ask questions like, "What do we know?" and "What is real?" simply have no bearing on Patterson's modest (but, as far as I can see, unsupported) claim that there is no standpoint outside law from which to answer the question, "Is the practice of judicial review justified?" For Quine, all theory is scientific theory because all questions are really questions of empirical fact—there are no non-empirical, purely analytical questions—and science is the practice that has had the most success handling questions of empirical fact. But it is perfectly easy to distinguish the question, "Is the Religious Freedom Restoration Act constitutional?"—a question "internal" to law, as it were—from the question, "Is it defensible in a democratic society for a court to decide this question?"

Because for Quine all theory is scientific theory, Quine explicitly repudiates the relativism that we have seen Patterson's "postmodern" position entails. Thus, in 1960, he wrote:

> Have we . . . so far lowered our sights as to settle for a relativistic doctrine of truth—rating the statements of each theory as true for that theory, and brooking no higher criticism? Not so. The saving consideration is that we continue to take seriously our own particular aggregate science, our own particular world-theory or loose total fabric of quasi-theories, whatever it may be. Unlike Descartes, we own and use our beliefs of the moment, even in the midst of philosophizing, until by what is vaguely called scientific method we change them here and there for the better. Within our own total evolving doctrine, we can judge truth as earnestly and absolutely as can be;

42. Roger F. Gibson, *Willard Van Orman Quine*, *in* A COMPANION TO METAPHYSICS (Jaegwon Kim & Ernest Sosa eds., 1995). For an interesting, extended treatment of this theme, see Peter Hylton, *Quine's Naturalism*, 19 MIDWEST ST. IN PHIL. 261 (Peter A. French et al. eds., 1994).

subject to correction, but that goes without saying.[43]

Far from thinking that this view permits him to move beyond "realism" and "anti-realism"—to leave this dispute behind as a vestige of the "modernist" conception of language—Quine draws the opposite conclusion:

> In my naturalistic stance I see the question of truth as one to be settled within science, there being no higher tribunal. This makes me a scientific realist. I keep to the correspondence theory of truth, but only holophrastically: It resolves out into Tarski's disquotational version of truth rather than a correspondence of words to objects.[44]

But why is there no "higher tribunal" than science? Here is where I think Quine's underlying pragmatism becomes important—though this is not the type of pragmatism Patterson finds in Quine, which he refers to as Quine's "pragmatism on questions of truth."[45] But Quine explicitly repudiates such an approach to truth: "Any so-called pragmatic definition of truth is doomed to failure. . . ."[46] Pragmatism enters not at the level of a theory of truth for Quine—Quine retains the correspondence theory of truth, as we have just seen—but at the level of *justification*. The reason all inquiry proceeds from within science is that science works; it "delivers the goods" one might say. Science, for Quine, is simply on a continuum with common sense,[47] which, like science, aims to predict the future course of experience in order to facilitate our coping with the world. It is just that science, unlike folk psychology or economics, predicts the future course of experience with much greater precision and reliability. For creatures like us, it is a pragmatic necessity to figure out what will come next. This pragmatic need puts us all "within" science as it were. "Our cognitive position is always internal to a body of substantive theory,"[48] and that theory is scientific because that is the theory that works for creatures like us. This Quinean pragmatism, once again, has no implications for the question of whether or not judicial review is justified or "legitimate" in a democratic society.

Patterson's misconstrual of the role of pragmatism in Quine's thought is connected to his more general misreading of Quine. He claims, for

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43. WILLARD VAN ORMAN QUINE, WORD AND OBJECT 24-25 (1960) [hereinafter "Word and Object"].

44. W.V.O. Quine, *Comment on Lavener*, *in* PERSPECTIVES ON QUINE 229 (Robert B. Barrett & Roger F. Gibson eds., 1990).

45. PATTERSON, *supra* note 1, at 159. Patterson cites HOOKWAY, *supra* note 4, at 50-58 on this point, but Hookway does not attribute to Quine a pragmatic theory of truth, only an appreciation of the role of pragmatic considerations to questions of what we are justified in believing. Indeed, Hookway lays emphasis on the point that "references to pragmatism vanish from Quine's [later] work," *id.* at 50, and that Quine "describes himself as a realist," *id.* at 52.

46. WORD AND OBJECT, *supra* note 43, at 23.

47. "The scientist is indistinguishable from the common man in his sense of evidence, except that the scientist is more careful." W.V.O. Quine, *The Scope and Language of Science*, *in* THE WAYS OF PARADOX AND OTHER ESSAYS 228, 233 (1976). See also WORD AND OBJECT, *supra* note 43, at 3 ("science is self-conscious common sense").

48. HOOKWAY, *supra* note 5, at 209. *Cf.* WORD AND OBJECT, *supra* note 43, at 22 ("we can never do better than occupy the standpoint of some theory or other, the best we can muster at the time").

example, that Quine embraced "holism, the view that the truth of any one statement or proposition is a function not of its relationship to the world but of the degree to which it 'hangs together' with everything else we take to be true."[49] But this assessment of Quine is wrong insofar as it makes Quine's holism sound like the coherence theory of truth, i.e., a proposition is "true" just in case it "'hangs together' with everything else we take to be true." However, truth, for Quine, is *not* a matter of coherence, but of correspondence "to the world" (even though for Quine, there is nothing philosophically substantial to say about truth-qua-correspondence beyond what Tarski gives us, and there is nothing more to the world than the world as depicted by science).

Putnam's talk about "truth" as attaching to what competent speakers would be "fully warranted" in asserting is similarly anathema to Quine, as is the notion that understanding or knowledge is a matter of "practice, warranted assertibility, and pragmatism."[50] The primacy of science may, ultimately, be justified on pragmatic grounds, but that does not mean that our norms for what we ought to believe (our norms for knowledge) are pragmatic ones. For science gives us our norms for belief, and the norms of science are not "pragmatic;" science does not say, "believe what is useful," but rather, "believe only those hypotheses that answer to the test of experience" and the like. From within science—the only vantage point we even have on the questions of what is real and what is not—truth is a matter of correspondence, knowledge is fixed by the epistemic standards of science (which are not, themselves, ones of "warranted assertibility" or "pragmatism"), and science is not simply one "practice" among many, one that fails to "enjoy[ ] a privileged position vis-à-vis others."[51] Science

49. PATTERSON, *supra* note 1, at 159. Patterson proceeds to quote a long passage from "Two Dogmas of Empiricism," which does not, as far as I can see, support his interpretation. The passage is *not* proposing a theory of "truth"—e.g., a proposition is "true" if it "hangs together" with everything else—but simply describing our epistemic situation, one aptly captured in Quine's favored metaphor of "Neurath's boat." *Id.*

Neurath analogizes our epistemological situation to sailors who are trying to rebuild their ship while at sea. Since they cannot rebuild the whole ship at once—they cannot step outside the ship and rebuild it from scratch—they must choose to stand firm on certain planks in the ship while reconstructing others. They will, of course, choose to stand firm on the planks that work the best—a pragmatic choice—while rebuilding those that are less dependable or useful or necessary. Of course, at a later date, the sailors may choose to rebuild the planks they stood on previously, and in so doing they will again stand on some other planks that best serve their practical needs at that point.

Our epistemic situation, for Neurath and for Quine, is the same: We necessarily stand firm on certain "planks" (hypotheses, epistemic norms, etc.) of our theoretical conception of the world while evaluating other claims about the world. The planks we choose to rest our epistemic edifice upon are just those that have worked the best for us in the past. For Quine, these are the planks that constitute science. Of course, nothing precludes the possibility that at some point in the future we will rebuild the scientific planks as well (while standing firm on other planks), but Quine does not, for good reason, see much evidence that pragmatic considerations will give us any reason to stand firm on other planks in our ship of knowledge.

50. PATTERSON, *supra* note 1, at 161. For a similar misinterpretation of Quine, see RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 170 (1979) and the attendant criticism in my *Rethinking Legal Realism*, *supra* note 7, at n.117.

51. PATTERSON, *supra* note 1, at 182.

is *the* practice—the only game in town as it were—insofar as we are interested in knowledge. There is no spirit of "epistemic tolerance" in Quine. Science, for Quine, sorts the wheat from the chaff when it comes to different "perspectives" on reality, and the upshot is fairly austere (the chaff includes not only religion, metaphysics, poetry, and astrology, but also non-behavioral psychology and all the special sciences insofar as they are unreducible to physics).[52]

Of course—to repeat—science enjoys its special status on Quine's view in virtue of its delivering on the pragmatic desiderata of helping us cope with experience better than any other practice. Creatures like us have to be able to anticipate the future course of experience; we have to figure out what will come next. Only science "delivers the goods" on that crucial pragmatic requirement. But once science is so enshrined, there is simply no standpoint from which to get a purchase on the notion of whether science describes the "real" world or whether science constitutes "genuine" knowledge. Talk about what is "real" or what we "know" is just another scientific discussion. Quine's "scientism"—his privileging of scientific discourse—is lost in Patterson's assimilation of Quine into "postmodernism." And Patterson affects this assimilation because he neglects Quine's naturalism and because he misunderstands Quine's pragmatism. Patterson's Quine, then, is not the Quine who has so profoundly influenced late-twentieth-century philosophy.

But perhaps there is yet another way of understanding the isomorphism between Quine's and Patterson's positions.[53] Just as Quine rejects "foundationalism" in epistemology—showing that science can have no foundation, nor does it need any—so too Patterson wants to show—*contra* writers like Posner,[54] Dworkin,[55] et al.—that law needs no foundation beyond the practice of legal argument itself. Patterson's anti-foundationalism in law is isomorphic, then, with Quine's anti-foundationalism in epistemology.

Once again, however, the similarity between the two positions is illusory. This is so for two reasons, the second more substantial than the first. First, foundationalism in epistemology[56] aims to *justify* our system of knowledge by showing that it rests on a foundation of: (a) beliefs that are justified by virtue of their being inferrable from other justified beliefs; and ultimately (b) "foundational" beliefs, i.e., those beliefs that are "justified" or "warranted" without their justification, depending on their receiving inferential support from any other beliefs. So the foundationalist

52. Quine's austere physicalism is a feature of his own substantive view that may not be entailed by his naturalism and pragmatism. For a discussion, see HOOKWAY, *supra* note 5.

53. Here I am indebted to Bill Powers.

54. *See generally* POSNER, *supra* note 17.

55. *See generally* DWORKIN, *supra* note 16.

56. I refer to the classical foundationalist tradition, from Descartes to Carnap. Foundationalism has had new life breathed into it by externalist reliabilism in the work of philosophers like Goldman, David Armstrong, and Fred Dretske.

thinks, contrary to Quine, that our body of scientific knowledge can be justified, *in the sense of being defended or upheld as epistemically special.* "Epistemically special" here means supported, at bottom, by foundational beliefs that enjoy a non-inferential warrant.

Now I do not see that when various writers propose that tort law is "really" about efficiency (e.g., Posner) or about corrective justice (e.g., Jules Coleman[57]) that this is the equivalent of a claim that the substantive body of tort doctrine can be justified, *in the sense of being defended or upheld as "normatively special" (whether the norms are moral or economic).* Writers like Posner and Coleman aim to "explain" tort law either conceptually, by explaining the underlying logic of the seemingly disparate doctrines of tort law,[58] or empirically, by licensing predictions of what the courts will do in the future in this domain. But it is perfectly possible to "explain," either conceptually or empirically, tort law in terms of, e.g., "efficiency" without thinking that this then provides a *justification* for the present structure of tort doctrine. It is the latter claim that we would need for the analogy of Quine to work.

Of course, someone might retort, writers like Posner plainly assume that because, e.g., tort law is "efficient," this constitutes a justification for the present structure of tort doctrine. The question, in that case, is whether Quinean arguments against epistemological foundationalism give us reason to reject Posner's justificatory "foundationalism" about tort law. This brings us to the second fatal problem with the analogy: The structure of Posner's putative foundationalism is not, in fact, isomorphic with that of the epistemological foundationalism that Quine critiques.

The epistemological foundationalist wants to justify science by showing that it satisfies a particular *epistemic norm*, namely, that science can be "built up" from: (a) foundational beliefs (i.e. those which enjoy a non-inferential epistemic warrant); and (b) beliefs inferrable from foundational beliefs. The thrust of Quine's anti-foundationalist argument is to show that such a procedure of "building up" is not possible; we cannot satisfy the justificatory demands of the foundationalist's epistemic norm. But notice, now, that it is the *content* of this epistemic norm itself that is *foundational*, and not simply the fact that we are seeking to "justify" science by reference to some norm.

It is on this latter point that the structure of the Posnerian position differs, thus rendering Quine irrelevant. The Posnerian wants to *justify* tort law by showing that it satisfies a particular norm of what we might call "political morality," namely, efficiency. But the *content* of this efficiency norm is not, itself, foundational in structure. A practice is "efficient," roughly, if it mimics the transactional outcomes of an ideal market (i.e., one in which there is perfect information, no transaction costs, etc.).

57. JULES L. COLEMAN, RISKS AND WRONGS (1992).

58. *See* Brian Leiter, *Tort Theory and the Objectivity of Corrective Justice*, 37 ARIZ. L. REV. 45, 46-47 (1995).

To be "efficient" is not to be "built up" via a justificatory process grounded in foundational beliefs. But since Quine's anti-foundationalism is an argument against such a justificatory process of "building up"—and not simply an argument against the enterprise of justification, *per se*—then Quine's anti-foundationalism is irrelevant to whether or not tort law can be, or needs to be, justified by reference to efficiency.

We can put the point a bit differently. Merely seeking a justification for a practice is not, in itself, "foundational" in the sense to which Quine objects. A foundational justification is one with a very particular structure, one that aims to show that a unique outcome can be justified ("built up") out of constituent elements that rest ultimately on some foundational beliefs (i.e., those that enjoy a non-inferential warrant). But not all attempts to justify a practice involve seeking a "foundationalist" justification in the objectionable sense. Quine's own defense of science, for example, is decidedly not foundational, but pragmatic, as we have seen. So too Posner's attempt to justify tort law or Dworkin's attempt to justify judicial review are not "foundationalist" in the sense to which Quine objects. The isomorphism between Quine's anti-foundationalism and Patterson's putative anti-foundationalism turns out to be spurious; it trades on an ambiguity in the word "foundational." The ambiguity resides in the fact that we can talk about justifying a doctrine or theory by giving it a "foundation" without meaning what the epistemological "foundationalist" means, namely that it is a unique theory, justified through a building-block process that rests on claims that enjoy a non-inferential warrant.

All of the foregoing, of course, leaves open the possibility that Patterson's approach to law may yet be defended on other grounds. In that sense, my conclusion is quite modest relative to the ambitious scope of Patterson's book. Simply put, I hope I have succeeded in showing that, contrary to Patterson, Quine the naturalist provides no help in defending a postmodern jurisprudence.